

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, DC 20554

RECEIVED  
DEC 16 1996  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
)  
Implementation of Section 309(j) )  
of the Communications Act - - )  
Competitive Bidding )  
)  
Amendment of Part 22 of the )  
Commission's Rules to Provide for the )  
Filing and Processing of Applications for )  
Unserved Areas in the Cellular Service )  
and to Modify Other Cellular Rules )

PP Docket No. 93-253

CC Docket No. 90-6

**REQUEST FOR CLARIFICATION  
OR, IN THE ALTERNATIVE,  
PETITION FOR LIMITED RECONSIDERATION**

DOCKET FILE COPY ORIGINAL

Coconino, Arizona RSA Limited Partnership ("Coconino"),<sup>1</sup> by its attorneys,  
hereby requests clarification or reconsideration of the Commission's eligibility require-  
ments for the Phase I cellular unserved area auction.<sup>2</sup> Specifically, the Commission  
states in the *Ninth Report and Order* that "[f]or mutually exclusive Phase I applications  
that were filed prior to our new FCC Form 175 filing requirement, only applicants that

<sup>1</sup> Coconino is the Block B wireline licensee (Station KNKN232) in the Arizona 2 - Coconino RSA, Market No. 319B. By Public Notice dated November 8, 1996, Coconino's Phase I unserved area application was designated for the January 13, 1997 Phase I cellular unserved area auction, along with nine other applications. See Public Notice, *FCC Issues Procedures, Terms and Conditions for January 13, 1997 Auction of Cellular Unserved Phase I and Phase II Service Areas*, DA 96-1850 (rel. Nov. 8, 1996).

<sup>2</sup> In the Matter of Implementation of Section 309(j) of the Communications Act, Competitive Bidding, Amendment of Part 22 of the Commission's Rules to Provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, PP Docket No. 93-253, CC Docket No. 90-6, *Ninth Report and Order*, FCC 93-361 (rel. Nov. 7, 1996) ("*Ninth Report and Order*").

No. of Copies rec'd  
List ABCDE

211

have **timely-filed** FCC Form 464 applications will be eligible to submit an FCC Form 175 and participate in the auction for these markets.”<sup>3</sup> Coconino hereby requests clarification that in this context, “timely filed” has the usual meaning, i.e., that the FCC Form 464 applications were acceptable for filing at the time they were filed. Should this construction be incorrect, Coconino requests limited reconsideration of Section 22.960 of the Commission’s Rules, as adopted in the *Ninth Report and Order*, to the extent this rule may be interpreted as allowing entities that have fatally deficient Phase I applications to nonetheless participate in the auction for Phase I unserved area licenses.

## **I. BACKGROUND**

On July 11, 1994, Applicant timely filed an application (Form 464) for unserved area in the Arizona 2 RSA. Nine other entities filed applications to serve the Arizona 2 RSA, but each of these applications proposed to serve area entirely encompassed by Coconino’s existing CGSA (File Nos. 9407158862013001 — 9407158862013009, collectively referred to as “Caraway applications”).<sup>4</sup> U S WEST NewVector Group, Inc. (“NewVector”), as Managing General Partner of Coconino, has submitted numerous

---

<sup>3</sup> *Ninth Report and Order*, at ¶ 11 (emphasis added).

<sup>4</sup> On April 11, 1994, 60 days prior to the expiration of the five year build-out period for the Arizona 2 RSA, and pursuant to Section 22.947(c) of the Commission’s Rules, Coconino filed a System Information Update (“SIU”) indicating its coverage of the Arizona 2 RSA. On June 10, 1994, Coconino filed an updated SIU depicting Coconino’s expanded coverage of the Arizona 2 RSA, thereby precluding any other proposals to serve areas within Coconino’s existing CGSA.

filings notifying the Commission of these defective applications. On August 4, 1995, NewVector filed a Petition to Deny which remains pending.<sup>5</sup>

## II. **TIMELY FILED APPLICATIONS ARE THOSE WHICH ARE ACCEPTABLE FOR FILING AT THE TIME THEY ARE FILED**

Pursuant to Section 22.949 of the Commission's Rules, "whenever two or more acceptable Phase I initial applications are timely filed in the same market on the same channel block, such Phase I initial applications are mutually exclusive . . . ."<sup>6</sup> This rule establishes two prerequisites for mutual exclusivity to exist among Phase I unserved area filings: the applications must be acceptable for filing when filed, and they must be timely filed. Consistent with established Commission precedent, as well as Section 22.128(d) of the Commission's Rules, applications that do not comply with Commission rules, or that request an authorization that would not comply with one or more of the Commission's rules, are defective and subject to dismissal.<sup>7</sup>

---

<sup>5</sup> On December 12, 1994, NewVector filed a letter termed "Notification Concerning Unserved Area Applications" informing the Commission that the nine applications were defective. On December 30, 1994, NewVector filed a second letter, requesting a "Public Notice Correction" to the Public Notice dated December 21, 1994 (Report No. CL-95-31), which listed the Arizona 2 RSA as a market subject to mutually exclusive applications. On January 20, 1995, NewVector filed a third letter, requesting dismissal of the nine applications as well as cancellation of the auction for the Arizona 2 RSA market. On August 4, 1995, NewVector submitted a Petition to Deny the nine applications. This Petition remains pending. Finally, in response to the Commission's November 8, 1996 Public Notice establishing auction procedures for the Arizona 2 RSA authorization, a letter was submitted to Rosalind Allen reiterating Coconino's concerns.

<sup>6</sup> 47 C.F.R. § 22.949(a)(2) (emphasis added).

<sup>7</sup> *Florida Cellular Mobile Communications v. FCC*, 28 F.3d 191, 198 (D.C. Cir. 1994) (upholding dismissal of application deemed "unacceptable for filing" for failure to comply with Commission procedural as well as substantive rules); *In re* (continued...)

The Caraway applications referenced above were filed for area already served by Coconino, in direct contravention of the rules in effect at the time the applications were filed. Specifically, Section 22.903 clearly stated that "service area boundaries of [unserved area] cells must not extend into the CGSA of any other licensee's cellular system on the same frequency block or into any adjacent MSA or RSA on a frequency block for which the five year fill-in period has expired." This explicit prohibition was retained by the Commission during the Part 22 rewrite proceeding,<sup>8</sup> and is contained in current Section 22.949(a)(1)(ii), which specifically prohibits Phase I initial applications from proposing any *de minimis* or contract service area boundary extensions. Thus, each of the nine applications referenced above - - which propose to serve area entirely subsumed within Coconino's existing CGSA - - were filed in blatant violation of the Commission's rules, obviously defective upon filing and therefore untimely filed.<sup>9</sup> This

---

<sup>7</sup> (...continued)  
*Application of Florida Cellular Mobile Communication Corporation*, Memorandum Opinion and Order, 6 FCC Rcd 354 (Mob. Serv. Div. 1991) (dismissing as "unacceptable for filing" an application that failed to comply with Commission ownership rules); *In the Matter of Local Area Telecommunications, Inc., Applications for Additional Channels in the Digital Electronic Messaging Service*, Memorandum Opinion and Order, 1986 LEXIS 2901 (Com. Car. Bur., Aug. 4, 1986) (only applications satisfying substantive requirements under Part 21 will be deemed "acceptable for filing"); *In re Applications of Western Telecommunications, Inc. for Authority to Construct and Operate Multichannel Multipoint Service Stations in Salt Lake City, Utah*, Memorandum Opinion and Order, 1986 LEXIS 3847 (Com. Car. Bur., Mar. 11, 1986) (applications must satisfy substantive requirements before being "acceptable for filing").

<sup>8</sup> See *In the Matter of Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, CC Docket No. 92-115, *Report and Order*, 9 FCC Rcd. 6513 (1994).

<sup>9</sup> The patent deficiencies in the Caraway applications are further confirmed by reference to Section 22.928(e)(2) of the Commission's Rules which provides for  
 (continued...)

deficiency renders the Caraway applicants ineligible to participate in an auction for the Arizona 2 RSA.

### **III. SECTION 309(j) OF THE COMMUNICATIONS ACT PRECLUDES AN AUCTION FOR THE ARIZONA 2 UNSERVED AREA AUTHORIZATION**

Pursuant to Section 309(j) of the Communications Act, the Commission has general authority to use competitive bidding to grant licenses or permits to qualified applicants “[i]f mutually exclusive applications are accepted for filing . . . .”<sup>10</sup> The Commission’s authority in this regard is not boundless, however. Indeed, Section 309(j)(6)(E) requires that the Commission employ several different means, including threshold qualifications, to avoid mutual exclusivity in application and licensing proceedings.<sup>11</sup> As noted above, the Caraway applications are facially deficient and as such can

---

<sup>9</sup> (...continued)  
the dismissal of applications that request spectrum already assigned to another licensee on an exclusive basis, or that can not be assigned without causing interference. As explained above, the Caraway applications seek an authorization for spectrum already assigned to Coconino as part of its previously authorized Arizona 2 CGSA. Further, although the Caraway applications purportedly seek an authorization to serve “unserved area,” the area proposed by Caraway is wholly within Coconino’s existing CGSA; thus, by definition, the Caraway applications are not applying for “unserved area” which is defined as “areas outside of all existing CGSAs (on either side of the channel blocks) . . . .” See Section 22.99 of the Commission’s Rules.

<sup>10</sup> The legislative history to Section 309(j) clearly establishes that the Commission’s auction authority is limited to those instances involving mutually exclusive applications. Specifically, “[t]he [Commission’s competitive bidding] authority would apply only when there are mutually exclusive applications for an initial license . . . .” Omnibus Budget Reconciliation Act of 1993, report of the Committee on the Budget, H.R. Rep. No. 103-111, at 254, *reprinted in* 1993 U.S.C.C.A.N. 378, 580.

<sup>11</sup> 47 U.S.C. § 309(j)(6)(E).

not be deemed mutually exclusive with Coconino's Phase I unserved area application.<sup>12</sup> These points were timely raised with the Commission on numerous occasions.<sup>13</sup> The Commission therefore has an obligation under Section 309(j)(6)(E) to resolve these issues before subjecting Coconino to an auction for the Arizona 2 RSA authorization.

Requiring Coconino to participate in an auction for the Arizona 2 RSA authorization, moreover, would result in an unnecessary waste of Commission resources. The Caraway applications, as noted, cannot be granted because they propose to serve area already served by Coconino. Thus, if any one of these nine entities won the Arizona 2 license at auction, Coconino would be forced to reinstitute its petition to deny, consuming the Commission's resources in a process that will inevitably result in an award of the Arizona 2 license to Coconino. Further, if Coconino is forced to bid and prevails at auction, it may be necessary to challenge the auction process after the fact to recoup money Coconino paid for a license that should not have been auctioned in the first place.

#### IV. CONCLUSION

For these reasons, Coconino respectfully requests clarification that, for purposes of the Phase I unserved area auction, "timely-filed" means that the required Form 464 was acceptable for filing at the time of filing. In the alternative, Coconino seeks limited reconsideration of the Commission's eligibility requirements for the Phase I cellular

---

<sup>12</sup> As explained above, these applications were facially defective upon filing, in contravention of Sections 22.903 (at the time of filing) and 22.949 (the current rule) of the Commission's Rules, and therefore untimely filed, precluding them from being deemed mutually exclusive with Coconino's application pursuant to Section 22.949(a)(2). Because mutual exclusivity does not exist with respect to the Arizona 2 license, the Commission does not have the authority to subject it to auction.

<sup>13</sup> See discussion *supra* note 5.

unserved area auction to the extent Section 22.960 may be interpreted to allow applicants that did not timely file FCC Form 464 applications to participate in the auction.

Respectfully Submitted,

Coconino, Arizona RSA Limited Partnership

By: 

Kathryn A. Zachem

Kenneth D. Patrich

WILKINSON, BARKER KNAUER & QUINN

1735 New York Avenue, N.W., Suite 600

Washington, DC 20006

(202) 783-4141

December 16, 1996

**Certificate of Service**

**I, Elizabeth S. Hines, hereby certify that true and correct copies of the preceding Request for Clarification or, in the Alternative, Petition for Limited Reconsideration, were served this 16th day of December, 1996 via regular mail upon the following:**

**ALPHA TRUST PARTNERSHIP  
1118 S. Home Avenue  
Park Ridge, IL 60068**

**EPSILON TRUST PARTNERSHIP  
617 Walker Street  
Melborne, FL 32901**

**ETA TRUST PARTNERSHIP  
217 Hartridge Hills Court  
Winter Haven, FL 33881**

**BETA TRUST PARTNERSHIP  
3625 Plaza Drive  
Chalmette, LA 70043**

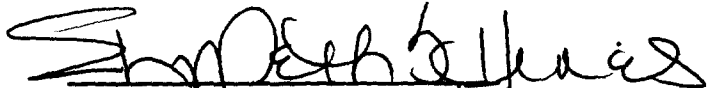
**THETA TRUST PARTNERSHIP  
P.O. Box 54  
Byron, GA 31008**

**CHI TRUST PARTNERSHIP  
248 Route 25-A #94  
East Setauket, NY 11733**

**DELTA TRUST PARTNERSHIP  
Route 2, Box 2137  
Belton, TX 76513**

**IOTA TRUST PARTNERSHIP  
5250 Twelve O'Clock Knob Road  
Roanoke, VA 24018**

**ZETA TRUST PARTNERSHIP  
570 Wexford Hollow Run  
Roswell, GA 30075**

  
Elizabeth S. Hines

**December 16, 1996**